Supreme Court, U.S.
FILED

No. _____

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In The Supreme Court of the United States

October Term, 1993

WILEY JACKSON MARSH
Petitioner
versus
PENROD DRILLING CORPORATION
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

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December 29, 1993

28 pp

QUESTIONS PRESENTED FOR REVIEW

This Petition for Writ of Certiorari presents the following questions for the Court's consideration:

A. Does the Jones Act, 46 U.S.C. § 688, preclude an award of prejudgment interest?

B. Does the "federal common law" displace the right of the Legislature of the State of Louisiana to enact statutes governing the procedure for the determination of interest claims in jury trials in the courts of the State of Louisiana? If so, does such a construction of the "federal common law" violate the Tenth Amendment to the United States Constitution?

C. Does the "federal common law" displace the right of the Louisiana Legislature to enact a statute mandating the award of prejudgment interest in Louisiana state court tort actions, thereby providing a supplemental remedy in federal cases tried in Louisiana state courts? If so, does such a construction of the "federal common law" violate the Tenth Amendment to the United States Constitution?

LIST OF PARTIES TO THIS PROCEEDING

The following party, plaintiff and appellee in the proceedings below, is the petitioner in this proceeding for writ of certiorari:

Wiley Jackson Marsh

The following party, defendant and appellant in the proceedings below, is the respondent in this proceeding for writ of certiorari:

Penrod Drilling Corporation

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WILEY JACKSON MARSH
Petitioner

versus

PENROD DRILLING CORPORATION
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Wiley Jackson Marsh respectfully petitions the Court for a writ of certiorari to review the judgment of the Louisiana Supreme Court, which denied discretionary review of a judgment of the Court of Appeal, Fourth Circuit, State of Louisiana, which reversed a judgment of a Louisiana State District Court which had awarded prejudgment interest in a Jones Act case tried to a jury.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Louisiana is reported at 625 So.2d 180 and reprinted at Appendix D. The opinion of the Court of Appeal, Fourth Circuit, State of Louisiana, is reported at 619 So.2d 1124 and reprinted at Appendix C. The opinion of the Louisiana State District Court is reprinted at Appendix A.

JURISDICTION

The Supreme Court of the State of Louisiana entered judgment on October 1, 1993. Petitioner invokes the jurisdiction of the Court under 28 U.S.C. §1257(a).

STATUTES INVOLVED

The following statutory provisions involved in this case are reprinted at Appendix E and Appendix F.

United States Code
The Jones Act, 46 U.S.C. §688
Louisiana Revised Statutes
LSA R.S. 13:4203

STATEMENT OF THE CASE

Wiley Jackson Marsh was a seaman who was injured on January 28, 1986 while he was assigned to vessel Penrod #60, a "jackup barge." Mr. Marsh filed suit in the Civil District Court for the Parish of Orleans contending that his injuries were caused by the unseaworthy condition of the vessel and by the Jones Act negligence of his employer, the Penrod Drilling Corporation. Mr. Marsh voluntarily dismissed the unseaworthiness claim prior to submitting the case to the jury.

The jury awarded general damages on the Jones Act claim in the amount of $62,500.00.

On July 24, 1992, the state District Judge entered reasons for judgment in which he concluded:

The Court has determined that judicial interest should be awarded from date of demand until paid based on La. R.S. 13:4203... .

The Defendant appealed the District Court's award of

prejudgment interest. On May 27, 1993, the Louisiana Court of Appeal, Fourth Circuit, reversed the award of prejudgment interest. On October 1, 1993 the Supreme Court of the State of Louisiana denied discretionary review.

REASONS FOR GRANTING THE WRIT

Summary of Argument

This case presents important questions of the interplay between federal and state law in Jones Act cases tried in state courts. We respectfully submit that the Louisiana Supreme Court has decided an important question of federal law which has not been, but should be, settled by this Court.

The Jones Act does not mention, much less specifically forbid, prejudgment interest. La. R.S. 13:4203 expressly authorizes the district courts to award interest from date of judicial demand on all damage actions tried in Louisiana state courts. Neither the doctrine of preemption nor the Supremacy Clause of the United States Constitution provide a proper basis for concluding that federal "common law" displaces La. R.S. 13:4203. Indeed, federal "common law" cannot displace La. R.S. 13:4203 in light of the clear and unambiguous provisions of the Tenth Amendment to the United States Constitution.

Argument

The Louisiana Court of Appeal's entire decision is based on a legally erroneous premise. At 629 So.2d 1126 the Court held:

"the Jones Act specifically forbids prejudgment interest in cases tried under its auspices. Since the determination of whether prejudgment interest is appropriate is a substantive issue, the provisions of the act apply" (Emphasis supplied).

A plain reading of the statute clearly shows that the Jones

Act does not even mention, much less specifically forbid, prejudgment interest.

This critical flaw in the Court of Appeal's legal reasoning is important because it is apparent that, under the Supremacy Clause of the United States Constitution, Art. VI, clause 2, and the Tenth Amendment to the United States Constitution, the "federal common law" cannot displace the right of the Louisiana Legislature to enact statutes providing for legal interest from date of judicial demand in damage cases tried in Louisiana state courts.

In 1916, the Louisiana Legislature enacted Act No. 206. Louisiana jurisprudence has long held that this act is "mandatory." **LeBlanc v. New Amsterdam Casualty Co.**, 202 La. 857, 13 So.2d 245 (1943). This act was subsequently placed in the Louisiana revised statutes as La. R.S. 13:4203 which reads: "Legal interest shall attach from date of judicial demand, on all judgments, sounding in damages, "ex delicto" which may be rendered by any of the courts."

The Tenth Amendment to the United States Constitution provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

It is well settled that state courts are free to devise their own methods of decision-making. Under Louisiana law, it is procedurally proper for a judge to award prejudgment interest under La. R.S. 13:4203. Whether the judge or the jury makes a decision such as this is squarely within the power of the respective sovereign to decide. **Byrd v. Blue Ridge**, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958). The Court of Appeal's opinion that the jury, not the judge, must rule on prejudgment interest is erroneous. When it comes to procedural issues in Louisiana courts, Louisiana law applies. See eg., **Felder v. Casey**, 487 U.S. 1301, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988).

The Jones Act does not preempt La. R.S. 13:4203 on the matter of prejudgment interest. Congress will not be deemed to have preempted state law: "in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion or that Congress has unmistakably so ordained." **Florida Lime & Avocado Growers v. Paul**, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed 2d 248, rehearing denied, 374 U.S. 858, 83 S.Ct. 1861, 10 L.Ed.2d 1082 (1963). This Court has been so reluctant to find that Congress has impliedly preempted an area of the law that it has imposed on the party claiming peremption the burden of demonstrating, with specificity, an intent to preempt. See, for example, **Silkwood v. Kerr McGee Corporation**, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2nd 443 (1984).

Congress did not address prejudgment interest when it enacted the Jones Act. Where Congress has not spoken it cannot be claimed that its intent is unmistakable. Indeed, under the Supremacy Clause of the United States Constitution, Art. 6, cl. 2, only the United States Constitution, laws enacted by Congress, and treaties are supreme over state law.

Similarly, the nature of the subject matter regulated, i.e. maritime torts, is not one which permits no other conclusion than that federal law preempts state law in all respects.

The Court of Appeals's opinion is particularly lacking in that it does not recognize that La. R.S. 13:4203 merely provides a supplemental remedy in Jones Act cases tried in state courts. It is axiomatic that the Jones Act is to be liberally construed in favor of the injured seaman. Louisiana can add to the protections given seaman without operating outside the proper boundaries defining the state and federal systems. In fact, there is a "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause." **Hillsborough County, Florida v. Automated Medical Laboratories, Inc.**, 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714, (1985), on remand 767 F.2d 748, on remand 775 F.2d 1430.

Many cases exist which blindly follow the federal "common law" principle that prejudgment interest is not awarded by the judge in a case which is tried to a jury. This principle is rooted in the ancient division of law, equity, and admiralty courts, a distinction which is inapposite in the modern Louisiana judicial system. The reason behind the rule in Jones Act cases was that juries were not considered qualified to determine interest awards. This rule has fallen into criticism in at least the United States Court of Appeals for the Fifth Circuit. See **Snyder v. Whittaker Corp.**, 839 F.2d 1085, (5th Cir. 1988) at 1094,1095. In Louisiana, due to La. R.S. 13:4203, the question of interest is never submitted to the jury. It is always a question of law for the court to decide.

These federal "common law" cases simply are not relevant to the issue before the Court as to whether a trial judge can apply state statutory law and make such an award.

In **Parker v. Rowan Companies, Inc.**, 599 So.2d 296 (La. 1992), it was argued that the state courts could not allow application of

Article 1732(b) of the Code of Civil Procedure in Jones Act cases in Louisiana state courts. This Court held at 301:

It has long been established that a state court, having concurrent jurisdiction with the federal courts as to in personam admiralty claims, is free to adopt such remedies and attach to them such incidents as it deems fit so long as it does not attempt to modify or displace essential features of the substantive maritime law.

The Court specifically held that the granting of rights to trial by jury available under applicable Louisiana Law did not violate the Supremacy Clause, or displace essential features of substantive maritime law. Additionally, the Court overruled prior decisions which held that a Jones Act case was a claim "at law" and held at 300 that it was

"clear that Jones Act claims are admiralty and maritime claims."[1]

Certainly, an award of prejudgment interest does not "modify or displace essential features of the substantive maritime law."

Although the availability of prejudgment interest may be a substantive question of law, when this availability is determined by whether the claimant chooses a bench or jury trial, the question then becomes a procedural question. Procedural issues such as this should be decided following the applicable state law.

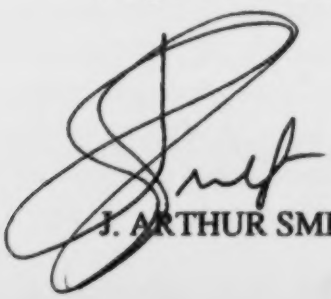
The District Court, in the instant case, correctly awarded prejudgment interest based upon La. R.S. 13:4203 and the District Court's judgment does not conflict with federal common law, properly construed.

It is a strong policy of Louisiana law to award legal interest to tort victims. For example, in **State v. Orkin Exterminating Company**, 528 So.2d 198 (La. App. 4th Cir. 1988) the Court held that it would offend public policy to fail to award legal interest and thereby permit the tortfeasor to profit from its own wrongdoing and injury to the Plaintiff. An application of Louisiana law is proper in determining the availability of legal interest in a Jones Act case brought in state court. Therefore, La. R.S. 13:4203 authorizes an award of legal interest.

CONCLUSION

For all the foregoing reasons, we respectfully conclude that Petitioner's application for writ of certiorari should be granted.

Respectfully submitted:



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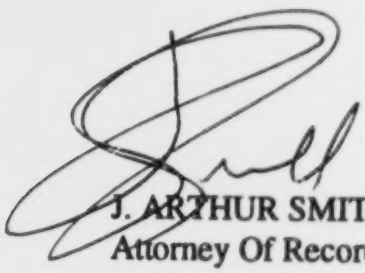
CERTIFICATE OF SERVICE

I, the undersigned, do certify that a copy of the above and foregoing Petition for Writ of Certiorari has this day been mailed via first class United States Mail, postage prepaid, to all counsel of record herein.

Baton Rouge, Louisiana, December 29, 1993.



J. ARTHUR SMITH, III
Attorney Of Record

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APPENDIX A

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 88-24554 DIVISION "K"

WILEY JACKSON MARSH
VERSUS
PENROD DRILLING CORPORATION

REASONS FOR JUDGMENT

The Court has determined that judicial interest should be awarded from date of demand until paid based on La. R.S. 13:4203 and **Corliss v. Elevating Boats, Inc., et al**M, No. 91-CA-1768, (La.App. 4 Cir. 1992).

New Orleans, Louisiana, this 24th day of July, 1992.

s/ R. J. Ganucheau
JUDGE

APPENDIX B

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 88-24554 DIVISION "K"

WILEY JACKSON MARSH
VERSUS
PENROD DRILLING CORPORATION

JUDGMENT

This matter came for trial by jury on the merits:

After considering the pleadings, the verdict and interrogatories of the jury and the law:

IT IS ORDERED, ADJUDGED AND DECREED that the fault in the accident forming the basis of these proceedings is hereby apportioned fifty percent (50%) to Penrod Drilling Corporation and fifty percent (50%) to Wiley Jackson Marsh.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Wiley Jackson Marsh, and against defendant, Penrod Drilling Corporation, in the sum of one hundred twenty five thousand dollars ($125,000.00) together with judicial interest from the date of demand until paid, subject to a reduction of fifty percent (50%) for the fault of plaintiff.

The expert fees of plaintiff's experts are hereby fixed at $300.00 for each expert and are taxed as costs herein. All costs of these proceedings are assessed against defendant, Penrod

Drilling Corporation.

JUDGMENT READ, RENDERED AND SIGNED this 24th day of July, 1992.

s/ Richard J. Ganucheau
JUDGE

APPENDIX C

WILEY JACKSON MARSH	*	NO. 92-CA-2760
versus	*	COURT OF APPEAL
PENROD DRILLING COMPANY	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * * * * *

APPEAL FROM
CIVIL DISTRICT COURT, FOR THE PARISH OF ORLEANS
NO. 88-24554, DIVISION "K"
HONORABLE RICHARD J. GANUCHEAU, JUDGE

* * * * * *

STEVEN R. PLOTKIN
JUDGE

* * * * * *

(Court composed of Judge Charles R. Ward and Judge Joan Bernard Armstrong and Judge Steven R. Plotkin)

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FOR DEFENDANTS/APPELLANTS

MAY 27 1993
REVERSED IN PART:
AFFIRMED IN PART:
RENDERED

Defendant Penrod Drilling seeks reversal of a trial court judgment awarding plaintiff, Wiley Jackson Marsh, prejudgment interest from the date of judicial demand on his Jones Act claim decided by a jury in state court. We reverse that portion of the judgment, deleting the award for prejudgment interest.

Facts

Marsh was injured on January 28, 1986 during the course and scope of his employment with Penrod Drilling while attempting to move a misplaced drill collar with a 20-pound, five foot long, steel prybar, which slipped and struck him. At the time of the accident, plaintiff had been assigned for about two years to the vessel Penrod #60, a "jack-up" barge whose mission was to drill for oil. Marsh filed suit against Penrod, contending that the 4,000 pound drill collar should have been moved with a crane, a suggestion vetoed by his supervisor, who threatened termination.

Marsh filed suit in state court under the Jones Act, alleging that his injuries were caused by two inseparable causes—the unseaworthy condition of the vessel and the negligence of Penrod.

After a trial, the jury returned a verdict finding both Penrod and Marsh negligent and apportioned fault 50-50 between them. According to a stipulation in the appeal record, the jury awarded Marsh lump sum damages under the Jones Act, 46 U.S.C. §688, in the amount of $62,500.00. The jury was not asked and, therefore, did not award prejudgment interest from the date of the incident, January 28, 1986, or from the date of judicial demand, December 20, 1988. In signing the judgment, the trial court nevertheless included prejudgment interest from the date of judicial demand in favor of Marsh, citing LSA-R.S. 13:4203 and Corliss v. Elevating Boats, Inc., 599 So.2d 434 (La. App. 4 Cir. 1992).

Penrod filed a motion for a partial new trial, contending that prejudgment interest is not recoverable in a Jones Act case tried by a jury. When that motion was denied, Penrod appealed.

Analysis

Generally, under the Jones Act, an injured seaman may file suit to recover damages for death or personal injury either in a federal court under admiralty jurisdiction or in a state or federal court under legal jurisdiction. However, under the applicable federal jurisprudence, prejudgment interest is not available in Jones Act claims that are brought in law in state court rather than in admiralty in federal court. Jones Act, 46 U.S.C.A. §688 (West's 1993), Ellender v. Texaco, 425 So.2d 291,297 (La. App. 3d Cir. 1982); Forbes v. A & P Boat-Rentals, Inc., 689

F.Supp. 625, 633 (E.D.La. 1988). In choosing whether to pursue his claim in state or federal court, "the seaman must make a tradeoff: if he elects to proceed at law, he can have a jury but must forego prejudgment interest; if he elects to proceed in admiralty, he can have prejudgment interest but no jury." Snyder v. Whittaker Corp., 839 F.2d 1085, at 1094 (5th Cir. 1988). Since the plaintiff in this case chose to proceed in state court before a jury, he is not entitled to prejudgment interest. The trial court was therefore clearly wrong in awarding the plaintiff such interest in this case, despite the general state rule which entitles plaintiffs to such interest.

The trial court improperly relied on Corliss in reaching his decision because that case involved an unseaworthiness claim tried in admiralty to a judge. The instant case was tried as a Jones Act case, tried to a state court jury. In fact, the court stated specifically in Corliss that the award in that case "was not made under state law, but rather under Federal law." Id. at 439. The Corliss court was simply following the general rule that prejudgment interest should be awarded in admiralty cases absent "peculiar circumstances." See Noritake Co., Inc. v. M/V Hellenic Champion, 627 F.2d 724, 728 (5th Cir. 1980).

When a Jones Act case is tried in a state court, the federal law, which would allow prejudgment interest, generally governs. However, the Jones Act specifically forbids prejudgment interest in cases tried under its auspices. Since the determination of whether prejudgment interest is appropriate is a substantive issue, the provisions of the act apply. Morris v. Schlumberger, Ltd., 436 So.2d 1178,1179 (La. App. 3d Cir.), writ denied 441 So.2d 1221 (La. 1983). Interest is available on a Jones Act claim only from the date of judgment. Forbes, 289 F.Supp. at 633. Since judgment was entered in this case on July 24, 1992, interest should start to run on that date.

When prejudgment interest has been allowed in a maritime

claim tried in state court under the Jones Act, the determination of whether to grant prejudgment interest has to be submitted to the jury. Havis v. Petroleum Helicopters, Inc., 664 F.2d 54 (5th Cir. 1981). In this case, the jury received no instructions and no evidence was presented concerning prejudgment interest. Additionally, the jury interrogatories did not address prejudgment interest. In Ellender, 425 So.2d at 291, the trial court's denial of prejudgment interest under similar facts was affirmed.

In the instant case, the damages were awarded a lump sum, with no indication of the amount awarded for each element of damages. When prejudgment interest is improperly awarded in a lump sum award with undifferentiated elements of damages, the award of interest must be reversed in its entirety. See Savoie v. McCall's Boat Rentals, Inc., 491 So.2d 94, 107 (La.App. 3d Cir. 1988).

Accordingly, the trial court judgment awarding prejudgment interest is reversed. The judgment is otherwise affirmed.

REVERSED IN PART;
AFFIRMED IN PART;
RENDERED.

APPENDIX D

THE SUPREME COURT OF THE STATE OF LOUISIANA

WILEY JACKSON MARSH

VS. NO. 93-C-1726

PENROD DRILLING CORPORATION

- - - - - -

IN RE: Marsh, Wiley Jackson; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number 92CA-2760; Parish of Orleans Civil District Court Div. "K" Number 88-24554

- - - - - -

October 1, 1993
Denied.

PH
PFC
JLD
JCW
HTL
CDK
ROO

Marcus, J., not on panel.

SUPREME COURT OF LOUISIANA
October 1, 1993

s/ Frans J. Labranche, Jr.
Clerk of Court
For the Court

APPENDIX E

The Jones Act, 46 U.S.C. §688

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred—

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources—including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not in-

cluding transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial water or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention of the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person—

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

APPENDIX F

La. R.S. 13:4203

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependant upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

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[1] The Court of Appeal in this case held at 619 So.2d 1126: "In choosing whether to pursue his claim in state or federal court, `the seaman must make a tradeoff: if he elects to proceed in law, he can have a jury but must forego prejudgment interest; if he elects to proceed in admiralty, he can have prejudgment interest but no jury.'" In light of the holding in **Parker v. Rowan Companies**, supra, it is questionable as to whether this rule of law is even applicable to Jones Act cases tried in the Louisiana state courts.